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Supreme Court, U.S.
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No. 04-6432

IN THE
SUPREME COURT OF THE UNITED STATES

RESPONSE REQUESTED

AURELIO O. GONZALEZ,

Petitioner,

vs.

JAMES V. CROSBY,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

Respectfully Submitted,

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QUESTION PRESENTED (restated)[1]

I. Whether the United States Court of Appeals for the Eleventh Circuit properly determined that under certain circumstances an attempt to reopen a federal habeas petition finally decided on the merits constitutes a successive petition and is subject to the requirements of 28 U.S.C. § 2244(b)?

[1]As discussed infra, at 7 and n.9, petitioner's second question presented is not properly raised before this Court.

TABLE OF CONTENTS

Questions Presented (Restated) i

Table of Contents ii

Table of Authorities iii

Opinion Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions 2

Statement of the Case and Facts 2

Reasons for Denying the Writ 8

Conclusion 26

TABLE OF AUTHORITIES

Pages

Cases

Abdur'Rahman v. Bell, 535 U.S. 1016 (2002) 25

Abdur'Rahman v. Bell, 537 U.S. 88 (2002) 18

Ackermann v. United States, 340 U.S. 193 (1950) 20

Allen v. Mitchell, 276 F.3d 183 (4th Cir. 2001) 21

Artuz v. Bennett, 531 U.S. 4 (2000) ..... 4, 19 and n.17, 20, 21, 22

Banes v. Moore, 532 U.S. 1005 (2001) (Mem.) 20

Bates v. Whitley, 19 F.3d 1066 (5th Cir. 1994) 14

Blackmon v. Armontrout, 2003 U.S. App. LEXIS 4332 (8th Cir. Mar. 12, 2003) (unpublished), cert. denied, 124 S.Ct. 120 (2003) 9

Blackmon v. Money, 27 Fed. Appx. 543 (6th Cir. Dec. 10, 2001) (unpublished) 22

Blair v. Armontrout, 976 F.2d 1130 (8th Cir. 1992), cert. denied, 508 U.S. 916 (1993) 10 n.10

Boufford v. Moore, 532 U.S. 1050 (2001) (Mem.) 20

Bonin v. Vasquez, 999 F.2d 425 (9th Cir. 1993) 10 n.10

Bousley v. United States, 523 U.S. 614 (1998) 14

Boyd v. United States, 304 F.3d 813 (8th Cir. 2002), cert. denied, 538 U.S. 953 (2003) 9

Brooks v. Walls, 301 F.3d 839 (7th Cir. 2002), cert. denied, 538 U.S. 1001 (2003) 21

Brown v. Moore, 532 U.S. 968 (2001) (Mem.) 20

Buell v. Anderson, 48 Fed. Appx. 491 (6th Cir. Sept. 24, 2002) (unpublished) 24

Burris v. Parke, 130 F.3d 782 (7th Cir.), cert. denied, 522 U.S. 990 (1997) 11, 24

Calderon v. Thompson, 523 U.S. 538 (1998) 13, 15 18, 23, 24

Carter v. United States, 150 F.3d 202 (2nd Cir. 1998) 14

Cohen v. Grant, 531 U.S. 988 (2000) (Mem.) 20

Conner v. Lemaster, 1999 U.S. App. LEXIS 2495 (10th Cir. Feb. 18, 1999) (unpublished) 22

Delancy v. Florida Department of Corrections, 246 F.3d 1328 (11th Cir. 2001) 4, 20

Dunlap v. Litscher, 301 F.3d 873 (7th Cir. 2002), cert. denied, 539 U.S. 962 (2003) .. 9, 12, 24

Felker v. Turpin, 518 U.S. 651 (1996) 16

Felker v. Turpin, 101 F.3d 657 (11th Cir.), cert. denied, 519 U.S. 989 (1996) 9

Freeman v. Page, 208 F.3d 572 (7th Cir.), cert. denied, 531 U.S. 946 (2000) 22

Gant v. United States, 1993 U.S. App. LEXIS 26819 (7th Cir. Oct. 7, 1993) (unpublished), cert. denied, 510 U.S. 1183 (1994) 10 n.10

Gitten v. United States, 311 F.3d 529 (2nd Cir. 2002) 9

Gonzalez v. Crosby, 366 F.3d 1253 (11th Cir. 2004) (en banc) 1, 6, 9, 12, 13, 24

Gonzalez v. Secretary for the Florida Dept. of Corrections, 317 F.3d 1308 (11th Cir. 2003), vacated and hearing en banc granted, 326 F.3d 1175 (11th Cir. 2003) 5

Guerroero v. Terhune, 531 U.S. 988 (2000) (Mem.) 20

Guyton v. United States, 23 Fed. Appx. 539 (7th Cir. Sept. 26, 2001) (unpublished) 22-23

Hamilton v. Newland, 374 F.3d 822 (9th Cir. 2004) 18

Harris v. Nelson, 394 U.S. 286 (1969) 14, 14-15, 15

Harris v. United States, 367 F.3d 74 (2nd Cir. 2004) 9, 11, 12

Harvey v. Horan, 278 F.3d 370 (4th Cir. 2002) 13

Hawkins v. Evans, 64 F.3d 543 (10th Cir. 1995) 14

Hayes v. Mills, 532 U.S. 1015 (2001) (Mem.) 20

Hernandez v. Peirson, 2000 U.S. App. LEXIS 30179 (7th Cir. Nov. 22, 2000) (unpublished), cert. denied, 532 U.S. 1068 (2001) 22

Houston v. Lack, 487 U.S. 266 (1988) 3 n.3, 5 n.6

Howard v. Lewis, 905 F.2d 1318 (9th Cir. 1990) 14

Hunt v. Nuth, 57 F.3d 1327 (4th Cir. 1995), cert. denied, 516 U.S. 1054 (1996) 9 n.10

In re Abdur'Rahman, 2004 U.S. App. LEXIS 25609 (6th Cir. Dec. 13, 2004) (en banc) ..... 9, 9-10 n.10, 11 and n.12, 12, 14 n.15, 18

In re: Cook, 215 F.3d 606 (6th Cir. 2000) 13-14, 14 n.15

Israfil v. Russell, 276 F.3d 768 (6th Cir. 2001), cert. denied, 535 U.S. 1088 (2002) 21

Johnson v. Wolfe, 41 Fed. Appx. 733 (6th Cir. Jun. 21, 2002) (unpublished) 21

Kiel v. Scott, 1999 U.S. App. LEXIS 2500 (10th Cir. Feb. 18, 1999) (unpublished), cert. denied, 528 U.S. 1115 (2000) 22

Lazo v. United States, 314 F.3d 571 (11th Cir.), vacated for rehearing en banc, 326 F.3d 1175 (11th Cir. 2003) ..... 5 and n.7, 6 n.8

Lindsey v. Thigpen, 875 F.2d 1509 (11th Cir. 1989) 10 n.10

Lopez v. Douglas, 141 F.3d 974 (10th Cir.), cert. denied, 525 U.S. 1024 (1998) ..... 9, 10, 11, 12, 13 and n.13

McQueen v. Scroggy, 99 F.3d 1302 (6th Cir. 1996), cert. denied, 520 U.S. 1257 (1997) 9-10 n.10, 10

Merritt v. Monroe, 326 F.3d 157 (3rd Cir.), cert. denied, 540 U.S. 921 (2003) 21

Mobley v. Head, 306 F.3d 1096 (11th Cir. 2002), vacated and hearing en banc granted, 326 F.3d 1175 (11th Cir. 2003) ..... 5 and n.7, 6 n.8

Moreland v. Lazaroff, 531 U.S. 988 (2000) (Mem.) 20

Morgan v. Money, 2000 U.S. App. LEXIS 1914 (6th Cir. Feb. 8, 2000) (unpublished) 22

Muniz v. United States, 236 F.3d 121 (2nd Cir. 2001) 17 n.16

Munoz v. United States, 331 F.3d 151 (1st Cir.), cert. denied, 124 S.Ct. 587 (2003) 9

Ortiz v. Stewart, 195 F.3d 520 (9th Cir. 1999) 9

Pace v. DiGuglielmo, 125 S.Ct. 26 (Sept. 28, 2004) (No. 03-9027) 21

Palmer v. Corcoran, 1999 U.S. App. LEXIS 23336 (4th Cir. Sept. 14, 1999) (unpublished) 22

Pitchess v. Davis, 421 U.S. 482 (1975) 15, 24

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) 14, 24

Polites v. United States, 364 U.S. 426 (1960) 20

Pridgen v. Shannon, 380 F.3d 721 (3rd Cir. 2004), pet. for cert. filed (10/29/04) (No. 04-7060) 17

Reid v. Angelone, 369 F.3d 363 (4th Cir. 2004) 12-13

Reinoso v. Artuz, 1999 U.S. Dist. LEXIS 7768 (S.D.N.Y. Apr. 14, 1999) (unpublished) 23

Rodriguez v. Mitchell, 252 F.3d 191 (2nd Cir. 2001) 11-12

Rodwell v. Pepe, 324 F.3d 66 (1st Cir.), cert. denied, 124 S.Ct. 224 (2003) 9, 11

Romaine v. Woods, 2000 U.S. App. LEXIS 18606 (9th Cir. Jul. 26, 2000) (unpublished) 22

Sanders v. United States, 373 U.S. 1 (1963) 16

Sargent v. Columbia Forest Prods., 75 F.3d 86 (2nd Cir. 1996) 23, 24

Schlup v. Delo, 513 U.S. 298 (1995) 14

Siebert v. Campbell, 334 F.3d 1018 (11th Cir. 2003) 21

Slack v. McDaniel, 529 U.S. 473 (2000) 10 n.10, 13 n.14, 16, 17 n.16, 18, 19

Stafford v. Thompson, 328 F.3d 1302 (11th Cir. 2003) 21

Stewart v. Martinez-Villareal, 523 U.S. 637 (1998) 13 n.14, 16, 17 n.16, 18, 19

Tal v. Miller, 1999 U.S. Dist. LEXIS 652 (S.D.N.Y. Jan. 11, 1999) (unpublished) 23

Thomas v. Roe, 23 Fed. Appx. 847 (9th Cir. Dec. 27, 2001) (unpublished) 22

Thompson v. Calderon, 151 F.3d 918 (9th Cir.), cert. denied, 524 U.S. 965 (1998) 9, 12

Tinker v. Hanks, 531 U.S. 987 (2000) (Mem.) 20

United States v. Bey, 2004 U.S. App. LEXIS 23915 (10th Cir. Nov. 16, 2004) (unpublished) 12, 13 n.13

United States v. Edwards, 309 F.3d 110 (3rd Cir. 2002) 9

United States v. MacDonald, 1998 U.S. App. LEXIS 22073 (4th Cir. Sept. 8, 1998) (unpublished) 12

United States v. Rich, 141 F.3d 550 (5th Cir. 1998), cert. denied, 526 U.S. 1011 (1999) 9

United States v. Winestock, 340 F.3d 200 (4th Cir.), cert. denied, 124 S.Ct. 496 (2003) 9, 12, 24

Wade v. Battle, 379 F.3d 1254 (11th Cir. 2004) 21

Weatherspoon v. Moore, 531 U.S. 988 (2000) (Mem.) 20

Webster v. Moore, 199 F.3d 1256 (11th Cir.), cert. denied, 531 U.S. 991 (2000) 22

Weekley v. Moore, 531 U.S. 1063 (2001) (Mem.) 20

Williams v. Cain, 217 F.3d 303 (5th Cir. 2000) 21-22

Williams v. Sims, 2004 U.S. App. LEXIS 24751 (7th Cir. Dec. 1, 2004) 21

Williams v. Whitley, 994 F.2d 226 (5th Cir.), cert. denied, 510 U.S. 1014 (1993) 9 n.10

Wright v. Norris, 299 F.3d 926 (8th Cir. 2002) 21

Statutes and Rules

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 2

28 U.S.C. § 2244(b) ..... i, 1, 2, 8, 9, 11, 12, 13 and n.14, 16, 17

28 U.S.C. § 2244(d) ..... 3, 15, 17 and n.16, 19, 20, 21, 22

28 U.S.C. § 2253(b) 21

28 U.S.C. § 2254 ..... 6 n.8, 8, 11 n.11, 14, 15, 20

28 U.S.C. § 2255 ..... 6 n.8, 8, 11 n.11, 14, 16

United States Supreme Court Rule 10 ..... 18, 25

Federal Rule of Appellate Procedure 4 ..... 4 n.6

Federal Rule of Civil Procedure 1 ..... 15, 23-24

Federal Rule of Civil Procedure 26 15

Federal Rule of Civil Procedure 33 15

Federal Rule of Civil Procedure 60(b) ..... *passim*

Federal Rule of Civil Procedure 81(a)(2) 15, 23-24

Rules Governing Section 2254 Cases, Rule 9(b) 10 n.10

Rules Governing Section 2254 Cases, Rule 11 15-16

Florida Supreme Court Rule 3.850 2

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SUPREME COURT OF THE UNITED STATES

AURELIO O. GONZALEZ,

Petitioner,
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JAMES V. CROSBY,

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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

OPINION BELOW

Petitioner, Aurelio O. Gonzalez, seeks review of the April 26, 2004 en banc opinion of the Unites States Court of Appeals for the Eleventh Circuit, holding, inter alia, that Gonzalez's motion for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure constituted a successive petition for which petitioner had not obtained authorization to bring pursuant to 28 U.S.C. § 2244(b), reported at Gonzalez v. Crosby, 366 F.3d 1253 (11th 2004).

STATEMENT OF JURISDICTION

Petitioner seeks jurisdiction pursuant to 28 U.S.C. § 1254(1) and Part III of the Rules of the United States Supreme Court. Petition, at 2. The State agrees that petitioner's request for

discretionary review is from a case from a United States court of appeals following rendition of judgment. As discussed below, however, the Eleventh Circuit did not address petitioner's second question presented and the issue is therefore not properly before this Court. See infra, at 7 and n.9.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The State agrees that Rule 60(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 2244(b) are involved in the issue presented. Neither the Suspension Clause nor the Due Process Clause to the United States Constitution, however, are implicated by the decision of the United States Court of Appeals for the Eleventh Circuit. In addition, petitioner's reference to 28 U.S.C. § 1291 in the argument portion of his petition, at 30, is not involved in the issue herein presented.

STATEMENT OF THE CASE AND FACTS[2]

Petitioner, Aurelio O. Gonzalez, was convicted of committing three counts of robbery with a firearm, one count of armed burglary, and one count of armed kidnapping, upon his guilty pleas, obtained in the Circuit Court of Dade County, Florida. See R1:1. The trial court sentenced petitioner on December 8, 1982, to a term of ninety-nine (99) years imprisonment. Id. Petitioner's first state postconviction relief motion, R:1:5:Ex. C, brought pursuant to Florida Supreme Court Rule 3.850, was denied as "legally insufficient" on September 14, 1994. R:1:5:Ex. D. Petitioner filed a successive motion for postconviction relief, R:1:5:Ex. I, outside the two-year state limitation period, which was summarily denied. R:1:5:Ex. J.

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[2]Consistent with petitioner, Respondent's citation to the record on appeal includes volume number, district court document number, and, where applicable, page number. See Petition, at 5. In addition, where applicable, citation will be made to the parties' briefs filed in the court of appeals.

Petitioner filed his petition for writ of habeas corpus in the United States District Court of Florida, Southern Division on June 23, 1997.[3] R1:1. He raised one ground for relief, asserting that newly discovered evidence rendered his guilty pleas invalid. The State, in its response to a show cause order, asserted that the petition was time-barred and, in addition, the claim was procedurally defaulted. R1:1:4-5. The district court permitted petitioner to amend his petition, R1:9, which was filed on November 12, 1997. R1:10. In its response to the amended petition, the State reasserted its earlier arguments. R1:12:3-4.

On July 16, 1998, the magistrate judge issued her "Report Re Dismissal §2254 Petition As Time Barred," recommending dismissal of the petition as having been filed outside of the one-year limitation period under 28 U.S.C. § 2244(d). R1:13:3-4; see also R1:15. Petitioner filed objections to the recommendation. R1:14. The magistrate judge subsequently issued a "Supplemental Report" on August 17, 1998, again recommending dismissal of the petition as time-barred. R1:16:4. The district court entered its "Order Of Dismissal of §2254 Petition As Time Barred" on September 9, 1998. R1:17.

On September 23, 1998, petitioner filed his notice of appeal from the denial of habeas corpus relief, R1:20, and filed a motion for a certificate of appealability ("COA"). R1:22. In an Order dated October 19, 1998, the district court granted COA without elaboration. R1:23. Petitioner's appeal was dismissed without prejudice on October 28, 1999 and the application for COA remanded "to the

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[3]Arguably, petitioner's original petition was filed on June 17, 1997, when he purportedly placed the petition into the prison mail system. See Houston v. Lack, 487 U.S. 266, 275 (1988). The copy of the petition received by Respondent reflects a "Filed" date of June 23, 1997, while petitioner executed the petition on "June 17, 1997." R1:1:6. The timeliness of the petition for writ of habeas corpus did not turn upon which of the above dates the petition was deemed filed.

district court for determination of which issues merit appeal under the amended requirements of 28 U.S.C. § 2253(c)." R1:23:2.

Petitioner thereafter filed a new application for COA with the district court, R1:26, which was denied on December 10, 1999. R1:27. Petitioner filed a new "Notice Of Appeal" on January 12, 2000, attempting to appeal the denial of COA. R1:28. The court of appeals treated the notice of appeal as an application for COA and dismissed the appeal on April 6, 2000. Thereafter, under the original appeal that had been dismissed without prejudice on October 28, 1999, petitioner submitted to the Eleventh Circuit a "Petition For Rehearing," on or about April 18, 2000, requesting that the court of appeals reconsider the denial of COA in that first appeal. The petition was returned to petitioner unfiled with a letter dated April 26, 2000.

Nearly sixteen months later, on August 2, 2001, petitioner filed his "Rule 60(b) Motion To Amend Or Alter Judgement." R1:33. In that motion, petitioner contended that the district court's order of dismissal should be vacated pursuant to Artuz v. Bennett, 531 U.S. 4 (2000) and Delancy v. Florida Department of Corrections, 246 F.3d 1328 (11th Cir. 2001). R1:33:6.[4] The district court denied the motion on March 5, 2002. R1:34.[5] Petitioner filed a "Notice Of Appeal" on April 9, 2002. R1:36.[6] The district court denied COA on May 14, 2002. R1:38.

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[4]The State does not agree with petitioner's characterization of his Rule 60(b) motion as "establish[ing] that his original habeas corpus petition was erroneously dismissed as procedurally barred." See Petition, at 8. The State disputed this issue in the circuit court. En banc Brief of the Respondent-Appellee, at 45-49. In any event, the merits of that issue are not properly before this Court from the court of appeals' decision.

[5]The district court believed that it was without jurisdiction to entertain the motion on the basis that petitioner had already appealed to the Eleventh Circuit. R1:34.

[6]Pursuant to F.R.A.P. 4(a)(1)(A), petitioner's notice of appeal was due on April 4, 2002. (continued...)

Subsequently, on August 15, 2002, a judge of the court of appeals granted petitioner a COA on the following issue: "Whether the district court erred in dismissing appellant's habeas corpus petition, 28 U.S.C. § 2254, as barred by the one-year statute of limitations provision in the Antiterrorism and Effective Death Penalty Act of 1996." Following briefing by the parties, a panel of the court of appeals issued its opinion on January 10, 2003, whereupon it ruled that "[t]he certificate of appealability previously granted in this case is QUASHED AS IMPROVIDENTLY GRANTED, and the appeal is DISMISSED." Gonzalez v. Secretary for the Florida Dept. of Corrections, 317 F.3d 1308, 1314 (11th Cir. 2003), vacated and hearing en banc granted, 326 F.3d 1175 (11th Cir. 2003).

On January 27, 2003, petitioner filed a "Motion To Reconsider, Vacate, Or Modify" before the court of appeals. That motion was denied as moot, while that court, en banc, on April 1, 2003, issued its order directing that the case be heard en banc, in conjunction with the cases of Lazo v. United States, No. 02-12483, and Mobley v. Head, No. 02-14224.[7] Gonzalez, 326 F.3d at 1176. The parties in the three cases were directed to address the following issues:

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[6](...continued)
Because petitioner purportedly placed his notice of appeal into the prison mail system on April 2, 2002, R1:36, his notice, though not filed in the district court until April 9, 2002, would be deemed timely. Houston, 487 U.S. at 267.

[7]See Lazo v. United States, 314 F.3d 571 (11th Cir.), vacated for rehearing en banc, 326 F.3d 1175 (11th Cir. 2003) and Mobley v. Head, 306 F.3d 1096 (11th Cir. 2002), vacated and hearing en banc granted, 326 F.3d 1175 (11th Cir. 2003) A petition for writ of certiorari has been filed in the Mobley case, assigned case number 04-6914 before this Court.

1) Is a certificate of appealability required before an appeal may be taken from the denial of a Rule 60(b) motion involving an order or judgment in a 28 U.S.C. 2255 [8] proceeding?

2) If so, should one issue in this case?

3) What standards or rules should govern Rule 60(b) motions involving an order or judgment in a 28 U.S.C. § 2255 proceeding, i.e., under what circumstances, if any, should such a motion be granted?

4) Was it an abuse of discretion for the district court to deny the Rule 60(b) motion in this case?

Subsequently, in a letter dated June 27, 2003, the court of appeals directed the parties to address the following issues by supplemental en banc letter briefs:

I. "To what extent if any, and how, should the general principles underlying habeas and section 2255 cases guide, and the provisions of AEDPA inform, the decision of whether the grant of Rule 60(b) relief relating to a habeas or section 2255 judgment is available, and if available, is an abuse of discretion?"; and

II. "By analogy to Calderon[v. Thompson, 523 U.S. 538 (1998)], and for the same or similar reasons, should this Court hold that, except in cases of actual fraud on the federal court which issued the judgment denying the habeas corpus petition or section 2255 motion, Rule 60(b) relief from judgment is available only 'to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence."

The Eleventh Circuit heard individual oral argument in the three cases, then issued a consolidated opinion on April 26, 2004. Gonzalez, 366 F.3d 1253. Therein, the en banc court first held that a habeas petitioner must obtain a certificate of appealability in order to appeal an order denying a Rule 60(b) motion. Id. at 1263-1266. In respect to Gonzalez specifically, the court of appeals thereafter determined that he was entitled to a certificate of appealability, id. at 1268, and that his Rule 60(b)(6) motion constituted a successive petition, as he was "attacking the merits of

[8]Both Gonzalez and Mobley involved state prisoners that sought relief under 28 U.S.C. § 2254; Lazo pertained to a habeas petition filed by a federal prisoner under 28 U.S.C. § 2255.

that decision [denying his habeas petition]—the term 'merits' referring to the correctness of the decision itself even though the ground of this particular decision was the statute of limitations, an affirmative defense." Id. at 1281.

Respondent does not dispute that petitioner's contention in his first question presented was raised and decided by the United States Court of Appeals for the Eleventh Circuit. Petitioner's second question presented, however, was not an issue that the court of appeals requested the parties to address and was not discussed by that court in rendering its decision. Therefore, petitioner's second question should not be considered as properly raised in petitioner's request for certiorari review.[9]

[9]In the context of addressing the court of appeal's question whether a certificate of appealability should issue, petitioner argued the underlying merits of the issue raised in the Rule 60(b) motion, citing a procedural due process right to a first federal habeas petition. En banc Brief of the Appellant, at 17-32. That issue was not before the Eleventh Circuit. In respect to the second portion of petitioner's second question presented, in addition to not being before or decided by the court of appeals, petitioner did not present the argument now made before this Court. Instead, petitioner only addressed the Suspension Clause in the context of his due process argument, disavowing any relevance there. Id. at 27 n.5 ("Some would argue that the right to habeas corpus derives, independent of statute, from the Suspension Clause of U.S. Const. Art. I, sec. 9, but that argument is irrelevant to the right of procedural due process applicable here.").

REASONS FOR DENYING THE WRIT

I. The United States Court of Appeals for the Eleventh Circuit properly determined that a Rule 60(b) motion seeking to reopen a final judgment decided on the merits in a federal habeas proceeding, on the basis that the disposition of that habeas petition was erroneous, constituted a successive petition subject to the requirements of 28 U.S.C. § 2244(b).

A. There is no significant split among the circuit courts of appeal.

Under subsection A of his first question presented, petitioner asserts that "the federal circuits remain sharply divided on the availability of Fed. R. Civ. P. 60(b) motions to challenge the integrity of final orders entered in habeas corpus proceedings." Petition, at 9-10. To the contrary, by overgeneralizing the issue before this Court, petitioner both misstates the current status of the law and fails to limit his discussion to the issue that the Eleventh Circuit decided in his case -- i.e., whether a Rule 60(b) motion could be used to reopen for reconsideration an issue upon which the habeas petition was adjudicated to final disposition on the merits. Considered accordingly, certiorari review is not warranted.

Rule 60(b) motions brought in the context of a petition for writ of habeas corpus under 28 U.S.C. § 2254 or § 2255 generally fall into one of three categories: those attempting to either relitigate or raise new claims challenging the conviction and/or sentence, those alleging some infirmity in the habeas proceedings, and those seeking review of a habeas denial upon a procedural basis. The Eleventh Circuit's Gonzalez opinion, individually addressing the distinct factual situations presented by the individual habeas petitioners, illustrates this practice. Id. at 1268 (Lazo - constitutional claim), 1282 (Mobley - alleged fraud on the district court), 1281-1282 (Gonzalez - dismissal as untimely). Thus petitioner's characterization of the court of appeals' decision as a "bright line holding," Petition, at 12, is inaccurate.

The vast majority of Rule 60(b) motions in the context of a habeas proceeding seek to relitigate previously raised or new claims attacking the judgment of conviction and/or sentence. Under those circumstances, the circuit courts of appeal are in full agreement that a Rule 60(b) motion in actuality is a successive petition subject to 28 U.S.C. § 2244(b). See, e.g., Munoz v. United States, 331 F.3d 151 (1st Cir.), cert. denied, 124 S.Ct. 587 (2003); Rodwell v. Pepe, 324 F.3d 66, 70 (1st Cir.), cert. denied, 124 S.Ct. 224 (2003); Harris v. United States, 367 F.3d 74, 82 (2nd Cir. 2004); Gitten v. United States, 311 F.3d 529, 534 (2nd Cir. 2002); United States v. Edwards, 309 F.3d 110, 112-113 (3rd Cir. 2002); United States v. Winestock, 340 F.3d 200, 206 (4th Cir.), cert. denied, 124 S.Ct. 496 (2003); United States v. Rich, 141 F.3d 550, 551 (5th Cir. 1998), cert. denied, 526 U.S. 1011 (1999); In re Abdur'Rahman, 2004 U.S. App. LEXIS 25609 *17-18 (6th Cir. Dec. 13, 2004) (en banc); Dunlap v. Litscher, 301 F.3d 873, 875 (7th Cir. 2002), cert. denied, 539 U.S. 962 (2003); Blackmon v. Armontrout, 2003 U.S. App. LEXIS 4332 *1 (8th Cir. Mar. 12, 2003) (unpublished), cert. denied, 124 S.Ct. 120 (2003); Boyd v. United States, 304 F.3d 813, 814 (8th Cir. 2002) (per curiam), cert. denied, 538 U.S. 953 (2003); Thompson v. Calderon, 151 F.3d 918, 921 (9th Cir.), cert. denied, 524 U.S. 965 (1998); Ortiz v. Stewart, 195 F.3d 520 (9th Cir. 1999) (per curiam); Lopez v. Douglas, 141 F.3d 974, 975 (10th Cir.) (per curiam), cert. denied, 525 U.S. 1024 (1998); Gonzalez, 366 F.3d at 1277; Felker v. Turpin, 101 F.3d 657, 660-662 (11th Cir.) (per curiam), cert. denied, 519 U.S. 989 (1996).[10]

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[10]Moreover, these decisions are consistent with those cases holding prior to the enactment of the Anti-terrorism and Effective Death Penalty Act (hereinafter "AEDPA") that a Rule 60(b) motion could not be used to avoid application of the abuse of the writ doctrine. See, e.g., Hunt v. Nuth, 57 F.3d 1327, 1339 (4th Cir. 1995), cert. denied, 516 U.S. 1054 (1996); Williams v. Whitley, 994 F.2d 226, 230 n.2 (5th Cir.), cert. denied, 510 U.S. 1014 (1993); McQueen v. Scroggy, 99 F.3d 1302, 1335 (6th Cir. 1996), cert. denied, 520 U.S. 1257 (1997), overruled on other grounds, In re
(continued...)

In relation to the treatment of Rule 60(b) motions seeking review of the constitutionality of the conviction and/or sentence, petitioner's attempt to demonstrate a widespread split among the circuits is superfluous. Petitioner erroneously characterizes the holdings of the Sixth and Tenth Circuits as taking an "extreme position." See Petition, at 13. According to petitioner, both McQueen v. Scroggy, 99 F.3d 1302 (6th Cir. 1996) (pre-AEDPA), cert. denied, 520 U.S. 1257 (1997) and Lopez v. Douglas, 141 F.3d 974 (10th Cir.) (per curiam), cert. denied, 525 U.S. 1024 (1998) stand for the proposition "that regardless of the substance of the allegations, a Rule 60(b) motion is always a second or successive habeas petition under AEDPA." Petition, at 13. To the contrary, both courts had before them Rule 60(b) motions challenging the underlying conviction and determined that the abuse of the writ doctrine or AEDPA precluded consideration. McQueen, 99 F.3d at 1335; Lopez, 141 F.3d at 975, respectively. In McQueen, the Rule 60(b) motion "raised broad allegations of constitutional violations. . . . [that were] never included in the initial petition." Id., 99 F.3d at 1335. In holding the motion to be a successive petition, the Sixth Circuit cited cases similarly addressing the propriety of raising challenges to the judgment of conviction and/or sentence in a Rule 60(b) motion. Id. Moreover, to the extent that McQueen could have been interpreted as adopting an all-or-nothing approach -- i.e., that a Rule 60(b) motion is always successive and thus subject to the abuse of the writ doctrine -- the Sixth Circuit has recently clarified its position,

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[10](...continued)
Abdur'Rahman, 2004 U.S. App. LEXIS 25609 *18; Gant v. United States, 1993 U.S. App. LEXIS 26819 *2-3 (7th Cir. Oct. 7, 1993) (unpublished), cert. denied, 510 U.S. 1183 (1994); Blair v. Armontrout, 976 F.2d 1130, 1134 (8th Cir. 1992), cert. denied, 508 U.S. 916 (1993); Bonin v. Vasquez, 999 F.2d 425, 428 (9th Cir. 1993); Lindsey v. Thigpen, 875 F.2d 1509, 1511-1512, 1515 (11th Cir. 1989). These pre-AEDPA decisions applied Rule 9(b) of the Rules Governing Section 2254 Cases (effective 1977), which incorporates the Court's prior decisions on successive petitions and abuse of the writ. Slack v. McDaniel, 529 U.S. 473, 486 (2000).

adopting a "functional approach." In re Abdur'Rahmon, 2004 U.S. App. LEXIS 25609 *18.[11] Similarly, the Rule 60(b) motion in Lopez sought reconsideration of a substantive claim raised in the habeas petition, one of ineffective assistance of trial counsel, which has been treated as a successive petition by all the courts of appeal. In holding that § 2244(b) applied, the Tenth Circuit cited to the Seventh Circuit's opinion in Burris v. Parke, 130 F.3d 782 (7th Cir.), cert. denied, 522 U.S. 990 (1997). See Lopez, 141 F.3d at 975. Burris held that a motion to recall the mandate seeking to relitigate a claim of ineffective assistance of counsel or to raise a new constitutional challenge to the conviction must be treated as a successive petition. Id., 130 F.3d at 785. Thus it simply is an overstatement to characterize the decisions of the Sixth and Tenth Circuits, as well as the Eleventh Circuit, as holding that a Rule 60(b) motion is always a successive petition for purposes of AEDPA.

Rule 60(b) motions are also brought to challenge the integrity of the judgment on a habeas petition, alleging, for example, fraud upon the district court.[12] Where the integrity of the judgment is implicated, the circuit courts have indicated that a Rule 60(b) motion would be the proper vehicle for raising the claim. See, e.g., Rodwell, 324 F.3d at 70; Harris, 367 F.3d at 82; Rodriguez v.

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[11]The functional approach entails consideration of the factual allegations raised in the motion and whether it falls within the parameters of Rule 60(b) generally. This approach, while recognizing the distinction between claims raising constitutional issues brought in § 2254 and § 2255 petitions, the integrity of the district court's judgment, and final disposition on procedural grounds, ignores the import of congressional intent in respect to federal habeas and the limits placed thereon and this Court's habeas jurisprudence.

[12]As discussed infra, at 19, a decision interpreting a procedural rule subsequent to the denial of habeas relief, where the earlier denial could be deemed erroneous upon retroactive application of that new decision, does not implicate the integrity of those prior proceedings. But see In re Abdur'Rahman, 2004 U.S. App. LEXIS 25609 *18. Review of the Sixth Circuit's decision there, however, reflects that that court gave no consideration to the distinction between a dismissal upon a technical procedural ground and an adjudication on the merits resting upon a procedural basis.

Mitchell, 252 F.3d 191, 199 (2nd Cir. 2001); Winestock, 340 F.3d at 20; United States v. MacDonald, 1998 U.S. App. LEXIS 22073 *8-9 (4th Cir. Sept. 8, 1998) (unpublished); Dunlap, 301 F.3d at 875; In re Abdur' Rahman, 2004 U.S. App. LEXIS 25609 *18; Thompson, 151 F.3d at 921 n.3; Gonzalez, 366 F.3d at 1278; but see United States v. Bey, 2004 U.S. App. LEXIS 23915 *8-9 (10th Cir. Nov. 16, 2004) (unpublished) (ruling without analysis that a Rule 60(b) motion alleging fraud is subject to 28 U.S.C. § 2244(b), and citing circuit precedent, Lopez, 141 F.3d at 975, which presented only the situation of a petitioner seeking to raise a constitutional challenge to his conviction through a Rule 60(b) motion and holding that it was successive).

As to these type of claims, petitioner asserts that the opinion of the Second Circuit in Harris v. United States, 367 F.3d 74 (2nd Cir. 2004) further "reinforced" the conflict among the circuits. Petition, at 13. To the contrary, petitioner's conclusion is based upon a misapprehension of the Gonzalez opinion. As previously stated, supra, at 8, the court of appeals identified three distinct types of claims raised in the Rule 60(b) motions filed by Lazo, Mobley, and Gonzalez. Just as the Eleventh Circuit did with Mobley's motion, the Second Circuit, relying upon circuit precedent, recognized that an attack to the integrity of the habeas proceeding may be raised in a Rule 60(b) motion while an attack to the conviction may be treated as a successive petition. Harris, 367 F.3d at 82. The petitioner in Harris had claimed that his *habeas* counsel had been ineffective, id. at 76, thus "arguably attack[ing] the integrity of Harris's habeas proceeding" so that the merits of the Rule 60(b) motion could be reached. Id. at 80; see also Reid v. Angelone, 369 F.3d 363, 375 (4th Cir. 2004) (propriety of refusal to permit withdrawal of habeas petition for exhaustion of state court

remedies subject to Rule 60(b) review). Viewed in respect to the characterization of the type of claim raised, there is no meaningful conflict.[13]

Turning to the last categorical basis for which a Rule 60(b) motion typically is filed in the context of a federal habeas proceeding -- the case of a *denial* of the petition upon a procedural basis[14] -- the Eleventh Circuit in Gonzalez's case held that based upon the passage of AEDPA, specifically § 2244(b), and the reasoning of Calderon v. Thompson, 523 U.S. 538 (1998), use of Rule 60(b) to challenge a determination of untimeliness was precluded. Gonzalez, 366 F.3d at 1281-1282.

As with pre-AEDPA cases addressing Rule 60(b) motions raising challenges to the conviction and/or sentence, Gonzalez is also consistent with both pre-AEDPA and post-AEDPA cases holding that the denial or termination of a habeas petition on procedural default grounds is a ruling on the merits for purposes of evaluating whether a subsequent pleading is a successive petition. See, e.g., Harvey v. Horan, 278 F.3d 370, 379-380 (4th Cir. 2002); In re: Cook, 215 F.3d

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[13]As previously observed, supra, at 12, while the Tenth Circuit held in an unpublished opinion that a claim of fraud in a Rule 60(b) motion presents a successive petition, Bey, 2004 U.S. App. LEXIS 23915 *8-9, that court cited circuit precedent, Lopez, 141 F.3d at 975, which had used broad language in holding that a motion seeking reconsideration of a constitutional challenge to the petitioner's conviction was successive.

[14]A *dismissal* on procedural grounds, i.e., a resolution on a technical basis, presents a distinct matter and does not raise the same interests in finality as an actual denial, i.e., final or merits disposition of a habeas petition. The reason for this distinction is that while a technical procedural defect can be remedied and anticipates subsequent litigation upon the underlying claims, a denial on procedural grounds forecloses further litigation of those underlying claims. Thus dismissal on technical grounds does not subject a subsequent petition to the requirements of 28 U.S.C. § 2244(b). See Stewart v. Martinez-Villareal, 523 U.S. 637, 643-645 (1998) (issue raised in first petition was not ripe for review); Slack, 529 U.S. at 473, 485-486 (dismissal for lack of exhaustion of state court remedies). Accordingly, as discussed infra, at 16-17, the court of appeals' resolution in Gonzalez is consistent with Stewart and Slack.

606, 607-608 (6th Cir. 2000)[15]; Carter v. United States, 150 F.3d 202, 205-206 (2nd Cir. 1998); Hawkins v. Evans, 64 F.3d 543, 547 (10th Cir. 1995); Bates v. Whitley, 19 F.3d 1066, 1067 (5th Cir. 1994); Howard v. Lewis, 905 F.2d 1318, 1322-1323 (9th Cir. 1990). Accord Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 228 (1995) ("The rules of finality, both statutory and judge made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: as a judgment on the merits.").

Gonzalez comports with this Court's recognition that while "habeas corpus proceedings are characterized as 'civil' . . . . the label is gross and inexact." Harris v. Nelson, 394 U.S. 286, 293-294 (1969). Unlike civil proceedings not arising under a special statutory grant of authority, a habeas corpus petition attacking a state judgment of conviction and sentence as violative "of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254(a), is subject to qualification. For example, a ground for relief in a habeas petition that was not properly raised in state court is subject to denial as procedurally defaulted unless the petitioner has a non-futile state court remedy to raise the claim, or can establish cause and actual prejudice or a fundamental miscarriage of justice in order to avoid the procedural default. Schlup v. Delo, 513 U.S. 298, 314-315 (1995); cf. Bousley v. United States, 523 U.S. 614, 622 (1998) (applying the procedural bar rule in the context of a § 2255 petition). Moreover, the draftsmen of the Federal Rules of Civil Procedure intended "that the rules would have very limited application in habeas corpus proceedings." Harris, 394 U.S. at 295.

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[15]The majority in In re Abdur'Rahman, 2004 U.S. App. LEXIS 25609 fails to address this principle that a denial on procedural grounds is a final adjudication and its own precedent so holding, citing Cook solely for the proposition that an unexhausted claim is deemed procedurally defaulted where the petitioner cannot return to state court to properly exhaust the claim. In re Abdur'Rahman, id. at *9.

Just as Rules 26 and 33 of the Federal Rules of Civil Procedure do not completely and automatically apply in habeas proceedings, Harris, 394 U.S. at 295-298, unfettered use of Rule 60(b) is similarly "ill-suited to the special problems and character of [habeas] proceedings." Id. at 296. And for any claim raised in a Rule 60(b) motion, the petitioner, prior to passage of AEDPA and where the motion was not an abuse of the writ, was required to first exhaust his or her state court remedies under 28 U.S.C. § 2254(b). Pitchess v. Davis, 421 U.S. 482, 489-490 (1975). Such limits on habeas corpus litigation reflect the Court's "respect for the State's interest in the finality of convictions that have survived direct review within the state court system," and recognize that "[f]inality is essential to both the retributive and the deterrent functions of criminal law." Calderon v. Thompson, 523 U.S. 538, 555 (1998) (internal citation and quotation marks omitted). The fact that this was Gonzalez's first petition is irrelevant; section 2254 does not give rise to an absolute right to consideration of substantive claims, as such review is conditional upon satisfaction of § 2244(d) as well as the requirement that a claim must have been properly presented before the state courts.

Moreover, Congress has expressly provided for the differential treatment of habeas corpus proceedings and ordinary civil actions. Rule 1 of the Federal Rules of Civil Procedure provides in pertinent part that "[t]hese rules govern the procedure in the United States district courts in all suits of a civil nature . . . *with the exceptions stated in Rule 81. . . .*" (emphasis added). Under Rule 81(a)(2), "[t]hese rules [the Federal Rules of Civil Procedure] are applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings *is not set forth in statutes of the United States* and has heretofore conformed to the practice in civil actions." (emphasis added). Additionally, Rule 11 of the Rules Governing Section 2254 Cases (effective 1977), provides that "[t]he Federal Rules of Civil Procedure, *to the extent that they are not inconsistent with these Rules*,

may be applied, when appropriate, to petitions filed under these rules." (emphasis added). The Eleventh Circuit's decision in Gonzalez simply effectuates the "'gatekeeping' mechanism for the consideration of 'second or successive habeas corpus applications' in the federal courts" established by Congress through 28 U.S.C. § 2244(b). See Stewart, 523 U.S. at 641; Felker v. Turpin, 518 U.S. 651, 657 (1996).

Because a determination that the underlying constitutional claims are not subject to review due to procedural grounds, i.e., the claims are procedurally defaulted or the petition is time-barred, constitutes a ruling on the merits, petitioner's reliance upon Stewart v. Martinez-Villareal, 523 U.S. 637 (1998) and Slack v. McDaniel, 529 U.S. 473 (2000), Petition, at 19, 21, is misplaced. In Stewart, this Court held that a habeas petition dismissed without prejudice on the basis that a claim was premature did not constitute adjudication of the claim to preclude its reassertion. Id., 523 U.S. at 644-645. Similarly, in Slack, a dismissal without prejudice because the substantive claims had not been exhausted in state court did not constitute a ruling on the merits such that their reassertion would be successive. Id., 529 U.S. at 486-487. Those circumstances are quite distinct from an adjudication finally disposing of a petition on procedural grounds that forecloses review of the underlying constitutional claims. Compare Sanders v. United States, 373 U.S. 1, 19 (1963) (dismissal based upon deficient pleading did not bar subsequently filed § 2255 petition). This Court's opinions in Stewart, Slack, and Sanders implicitly recognize the principle that not every adjudication of a habeas petition on procedural grounds is a technical ruling; otherwise there would

have been no reason for the Court to consider whether there had been an adjudication of the merits of the petitions at issue in those cases.[16]

Respondent recognizes that resolution of the issue whether a Rule 60(b) motion challenging the final disposition of a habeas petition on procedural grounds has not been consistent among a limited number of the circuit courts of appeal considering the matter. The differing treatment does not, however, warrant certiorari review at this time.

In Pridgen v. Shannon, 380 F.3d 721 (3rd Cir. 2004), pet. for cert. filed (10/29/04) (No. 04-7060), the Third Circuit Court of Appeals considered a claim as to whether a challenge brought in a Rule 60(b) motion based upon newly discovered evidence and application of § 2244(d)(2) was successive or could be considered on the merits. Id. at 722. While the Third Circuit adopted the approach taken by every other circuit holding that an attempt to relitigate underlying constitutional claims implicated § 2244(b), id., the court there concluded that the timeliness issue was properly considered under Rule 60(b). Id. at 727-728. The scope of that court's analysis, however, is limited, relying in conclusory fashion upon the fact that the challenge was "an attack on the habeas proceeding" because Pridgen alleged "that the District Court misinterpreted Pennsylvania law and AEDPA." Id. at 18.

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[16]In addition to his citation to Slack and Stewart, petitioner's reliance upon Muniz v. United States, 236 F.3d 122 (2nd Cir. 2001) on this issue is misplaced. Muniz involved review of an application to file a successive petition. In the course of deciding whether petitioner was required to make such a request, the Second Circuit improperly treated a dismissal pursuant to § 2244(d) as a "technical procedural" defect and was particularly concerned that the habeas petitioner there, through filing an application for a certificate of appealability, had sought a timely appeal asserting an erroneous determination under § 2244(d), wherein application of two decisions that had been released by the appellate court *after the petition was dismissed but within the time for appeal* would have resulted in the petition being deemed timely filed. Muniz, id. at 128.

On December 13, 2004, the Sixth Circuit en banc issued its opinion in In re Abdur'Rahman, addressing whether a Rule 60(b) motion is a proper vehicle for raising a challenge to a habeas denial based upon a procedural bar. Id., 2004 U.S. App. LEXIS 25609. Review of the 7-6 majority opinion, however, reflects that no consideration was given to this Court's decisions in Calderon, Slack, or Stewart.

The Ninth Circuit Court of Appeals, in Hamilton v. Newland, 374 F.3d 822 (9th Cir. 2004), considered whether a claim of actual innocence could properly be raised in a Rule 60(b) motion where the habeas petition had been rejected as untimely. In concluding that the motion was not a second or successive petition, the court there neglected to provide any analysis in asserting that "Rule 60(b) is the appropriate rule to invoke when one wishes a court to *reconsider claims it has already decided*." Id. at 825 (emphasis added).

Thus to date, then, only two other circuit courts of appeal have addressed the precise issue presented in Gonzalez's Rule 60(b) motion, that being the correctness of the determination as to timeliness of the habeas petition, and in permitting consideration of the motions, neither provided any analysis to support its decision. Just as the circuit courts of appeal, subsequent to this Court's dismissal of Abdur'Rahman v. Bell, id., 537 U.S. 88 (2002), have rejected the all-or-nothing approach previously discerned in some opinions, it is likely that further analysis by the majority of circuits will clarify the appropriate treatment of Rule 60(b) motions in the context of a denial of a habeas petition on procedural grounds without this Court's review. And given the limited instances in which the issue has arisen, there is not the conflict on an important matter as contemplated under Rule 10 of the Rules of the Supreme Court of the United States.

B. Gonzalez does not conflict with Supreme Court precedent.

Petitioner's argument in subsection B of his first question presented, Petition, at 16-27, also does not warrant this Court's discretionary review, as it simply is not the case that Gonzalez established a "bright-line prohibition of Rule 60(b)(6) jurisdiction in habeas corpus cases. . . ." Petition, at 16. See supra, at 8. Moreover, the Eleventh Circuit's analysis comports with this Court's precedent and the mandate of Congress in its enactment of AEDPA. Slack and Stewart do not compel a result contrary to that reached by the Eleventh Circuit. Compare Petition, at 17-19. As discussed supra, at 16-17, there is a distinction between a procedural dismissal anticipating subsequent resolution of the underlying constitutional challenges to a conviction and/or sentence -- nonexhaustion or that the challenge is not ripe for review -- versus a procedural disposition thereupon precluding review of those underlying claims at any time -- untimeliness of the petition or denial of a claim due to a procedural bar.

The fact that a decision of this Court interpreted 28 U.S.C. § 2244(d)(2) differently from prior opinions of the lower courts does not demonstrate an infirmity in the habeas proceedings. Instead, and at most, the complaint is that the district court should have applied § 2244(d)(2) differently because its understanding of the procedural statute turned out to be contrary to this Court's subsequent interpretation. Accordingly, petitioner's claim of entitlement to review of the underlying claims attacking his judgment of conviction and/or sentence following this Court's opinion in Artuz v. Bennett, 531 U.S. 4 (2000) -- the decision upon which his 60(b) motion relied -- is without merit.[17] His recourse to challenge an alleged erroneous application of law was to file a petition for writ of

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[17]As discussed supra, at 4 n.4, the State disputed the timeliness of Gonzalez's petition irrespective of the applicability of Artuz.

certiorari from the denial of COA upon the habeas petition. A number of habeas petitioners sought such relief from this Court both prior to and subsequent to the grant of certiorari in Artuz. See, e.g., Boufford v. Moore, 532 U.S. 1050 (2001) (Mem.); Hayes v. Mills, 532 U.S. 1015 (2001) (Mem.); Banes v. Moore, 532 U.S. 1005 (2001) (Mem.); Brown v. Moore, 532 U.S. 968 (2001) (Mem.); Weekley v. Moore, 531 U.S. 1063 (2001) (Mem.); Cohen v. Grant, 531 U.S. 988 (2000) (Mem.); Guerroero v. Terhune, 531 U.S. 988 (2000) (Mem.); Moreland v. Lazaroff, 531 U.S. 988 (2000) (Mem.); Weatherspoon v. Moore, 531 U.S. 988 (2000) (Mem.); Tinker v. Hanks, 531 U.S. 987 (2000) (Mem.). In fact, each of the above-listed petitioners whose cases originated in the Eleventh Circuit[18] filed for certiorari prior to that court's decision applying Artuz, see Delancy v. Florida Dept. of Corrections, 246 F.3d 1328 (11th Cir. 2001), thus demonstrating that Gonzalez also could have sought further review without awaiting this Court's decision in Artuz interpreting § 2244(d)(2). A Rule 60(b) motion is not a substitute for appeal. Ackermann v. United States, 340 U.S. 193, 202 (1950); see also Polites v. United States, 364 U.S. 426, 431-433 (1960) (decision not to appeal generally cannot be circumvented by seeking Rule 60(b) relief; not deciding whether an alleged change in the interpretation of *substantive* law permits Rule 60(b) consideration where the prior opportunity to appeal was abandoned).

If, however, a Rule 60(b) motion is proper to seek relitigation upon a subsequent interpretation of a procedural rule, wherein the former interpretation of that rule had previously resulted in a final adjudication of a habeas petition, the underlying judgment of conviction and/or sentence potentially would never be accorded finality. That is, such disregard for AEDPA renders a prior adjudication in a habeas proceeding vulnerable to post-judgment attack vis-a-vis Rule 60(b)

[18]Those petitioners included Banes, Boufford, Brown, Weatherspoon, and Weekley.

any time a different interpretation of a procedural rule is announced, irrespective of the time period that had elapsed since denial of the § 2254 petition. Obviously the requirement of challenging a denial on procedural grounds from a final judgment through a timely appeal would be eviscerated, or alternatively, would provide the habeas petitioner with a second opportunity for review and in the process circumvent § 2253(b). Moreover, in light of Congress' inclusion of a statute of limitations with a very limited provision for the running of the one-year period upon creation of a new constitution right and an equally narrow exception for bringing a successive petition under the same circumstances, it is incredulous that Congress intended that a habeas petitioner have greater rights in respect to a procedural rule of law.

Thus if a Rule 60(b) motion may be used to raise a subsequent interpretation of § 2244(d)(2) following issuance of Artuz v. Bennett, then logically the same would be true upon the Court's forthcoming decision in Pace v. DiGuglielmo, 125 S.Ct. 26 (Sept. 28, 2004) (No. 03-9627), a case involving further interpretation of § 2244(d)(2), concerning the filing of untimely state collateral applications. Cases that could well see the filing of a Rule 60(b) motion if the Court were to conclude that the time is tolled upon the filing of an untimely state petition, would include, for example: Williams v. Sims, 2004 U.S. App. LEXIS 24751 (7th Cir. Dec. 1, 2004); Wade v. Battle, 379 F.3d 1254 (11th Cir. 2004); Merritt v. Monroe, 326 F.3d 157 (3rd Cir.), cert. denied, 540 U.S. 921 (2003); Siebert v. Campbell, 334 F.3d 1018 (11th Cir. 2003); Stafford v. Thompson, 328 F.3d 1302 (11th Cir. 2003); Johnson v. Wolfe, 41 Fed. Appx. 733 (6th Cir. Jun. 21, 2002) (unpublished); Brooks v. Walls, 301 F.3d 839 (7th Cir. 2002), cert. denied, 538 U.S. 1001 (2003); Wright v. Norris, 299 F.3d 926 (8th Cir. 2002); Allen v. Mitchell, 276 F.3d 183 (4th Cir. 2001); Israfil v. Russell, 276 F.3d 768 (6th Cir. 2001), cert. denied, 535 U.S. 1088 (2002); Williams v. Cain, 217 F.3d 303 (5th

Cir. 2000); Morgan v. Money, 2000 U.S. App. LEXIS 1914 (6th Cir. Feb. 8, 2000) (unpublished); Hernandez v. Peirson, 2000 U.S. App. LEXIS 30179 (7th Cir. Nov. 22, 2000) (unpublished), cert. denied, 532 U.S. 1068 (2001); Freeman v. Page, 208 F.3d 572 (7th Cir.), cert. denied, 531 U.S. 946 (2000); Romaine v. Woods, 2000 U.S. App. LEXIS 18606 (9th Cir. Jul. 26, 2000) (unpublished); Webster v. Moore, 199 F.3d 1256 (11th Cir., cert. denied, 531 U.S. 991 (2000); Palmer v. Corcoran, 1999 U.S. App. LEXIS 23336 (4th Cir. Sept. 24, 1999) (unpublished); Kiel v. Scott, 1999 U.S. App. LEXIS 2500 (10th Cir. Feb. 18, 1999) (unpublished)), cert. denied, 528 U.S. 1115 (2000); Conner v. Lemaster, 1999 U.S. App. LEXIS 2495 (10th Cir. Feb. 18, 1999) (unpublished). The foregoing list is without consideration of those district court § 2244(d) dismissals in which a certificate of appealability was not obtained.

Petitioner's reliance upon Blackmon v. Money, 27 Fed. Appx. 543 (6th Cir. Dec. 10, 2001) (unpublished) and Thomas v. Roe, 23 Fed. Appx. 847 (9th Cir. Dec.27, 2001) (unpublished), Petition, at 20, wherein consideration of the propriety of dismissing a habeas petition as untimely under § 2244(d) was permitted under Rule 60(b) following Artuz v. Bennett, 531 U.S. 4 (2000), is misplaced. In neither case does it appear that the successive nature of the Rule 60(b) motion was raised nor addressed. Thus these cases are inapposite.

Similarly, petitioner's citation to another unpublished opinion, Guyton v. United States, 23 Fed. Appx. 539 (7th Cir. Sept. 26, 2001) (unpublished), does not support application of Rule 60(b) under the circumstances of an alleged error of law. Instead, in dicta, the Seventh Circuit stated that "[h]ad Guyton filed his Rule 60(b) motion in the district court within the one-year limitation in that rule, the district court *probably* could have corrected its own error." Id. at 540 (emphasis added). In that case, as stated by the appellate court, the petitioner had "pursuant to 28 U.S.C. § 2255 and

Federal Rule of Civil Procedure 60(b) . . . filed a second petition *nunc pro tunc*." Id. at 539. Thus the issue herein presented was not before the court in Guyton.

Nor does petitioner's reliance upon unpublished district court cases, Tal v. Miller, 1999 U.S. Dist. LEXIS 652 (S.D.N.Y. Jan. 11, 1999) (unpublished) and Reinoso v. Artuz, 1999 U.S. Dist. LEXIS 7768 (S.D.N.Y. Apr. 14, 1999) (unpublished), Petition, at 21, call into question the Eleventh Circuit's reasoning. In each of those decisions a Rule 60(b) motion provided a mechanism for application of new decisional law to reinstate a habeas petition previously dismissed as untimely. The reasoning in Tal, relied upon in Reinoso, actually necessitates the contrary result reached in those decisions in light of this Court's opinion in Calderon. That is, the court in Tal looked to the purpose behind Rule 60(b)(6), that it "is to be 'liberally construed when substantial justice will thus be served' and the motion is to be granted when 'there are extraordinary circumstances . . . or where the judgment may work an extreme and undue hardship,'" Tal, 1999 U.S. Dist. LEXIS 652 *3 (internal citation omitted) -- the same basis upon which appellate courts may recall their mandates -- and relying upon pre-Calderon case law, *approved the use of Rule 60(b) analogizing with a federal appellate court's power to recall its mandate*. Id. (citing Sargent v. Columbia Forest Prods., 75 F.3d 86, 89 (2nd Cir. 1996) (emphasis added)). As discussed infra, at 24, Calderon requires the contrary result. Further, the district court's conclusion that the Rule 60(b) motion was not successive erroneously rested upon its rejection of the rule that a dismissal for untimeliness is an adjudication on the merits, instead stating that it was "more akin to a subsequent petition after state court remedies have been exhausted." Tal, id. at *9.

In addition, petitioner's argument that the circuit court "[o]verlook[ed] Congressional silence on Rule 60(b) . . . ." Petition, at 22, neither addresses the applicability of Rules 1 and 81(a)(2) of the

Federal Rules of Civil Procedure, see supra, at 15, nor recognizes that the same certainly could be said in respect to pre-AEDPA treatment of Rule 60(b) and whether a habeas petitioner was required to exhaust his state court remedies before seeking 60(b) relief -- a position rejected by this Court. Pitchess, 421 U.S. at 489-490. That is, notwithstanding that "Rule [60(b)] does not by its terms speak to the requirement of exhaustion of remedies as a prerequisite for federal habeas relief. . . . [t]he exhaustion requirement, *Picard v. Connor, 404 U.S. at 276*, is statutorily incorporated in *28 U.S.C. §§ 2254* (b) and (c) . . . ." and thus pursuant to Rule 81(a)(2), any claim raised in a 60(b) motion must meet the exhaustion requirement. Id.

Finally, petitioner's argument that the circuit court should not have applied Calderon v. Thompson, 523 U.S. 538 (1998), Petition, at 23-24, does not compel discretionary review. Petitioner ignores the fact that a motion to recall an appellate mandate and a Rule 60(b) motion similarly are limited to addressing extraordinary circumstances. See Calderon, 523 U.S. at 550 (motion to recall the mandate); Plaut, 514 U.S. at 233 (Rule 60(b) motion). And in addition to the Eleventh Circuit, Gonzalez, 366 F.3d at 1272-1277, other circuit courts of appeal, adopting the logic in Calderon, have followed suit in the context of Rule 60(b) motions seeking review of the denial of a habeas petition. See, e.g., Winestock, 340 F.3d at 206; Buell v. Anderson, 48 Fed. Appx. 491, 495 n.2 (6th Cir. Sept. 24, 2002) (unpublished); Dunlap, 301 F.3d at 875. That determination is not an aberration, as a Rule 60(b) motion has been viewed as equivalent to a motion to recall the mandate. See, e.g., Sargent, 75 F.3d at 89; Burris, 130 F.3d at 783; Gonzalez, 366 F.3d at 1276-1277.

In summary, as demonstrated above, the circuits have taken a case-by-case approach, looking to what categorical type of claim the Rule 60(b) motion raises upon which the habeas petitioner seeks to reopen a final judgment. Simply put, there is not the extent of the conflict that could

previously have been perceived. Thus this Court's prior grant of a writ of certiorari on the issue, see Abdur'Rahman v. Bell, 535 U.S. 1016 (2002), and relied upon petitioner, Petition, at 10-11, does not support discretionary review in this case. Rather, the circuit courts of appeal continue to refine their discussion of and have clarified the manner in which Rule 60(b) motions are to be treated when brought in habeas corpus proceedings. In respect to the propriety of a Rule 60(b) motion upon a denial on the merits based on a procedural rule specific to habeas corpus jurisprudence, the circuits should be permitted continued consideration of the issue. Based upon the foregoing, the Eleventh Circuit's Gonzalez opinion does not warrant granting a writ certiorari. The petition should, accordingly, be denied. Rules of the Supreme Court of the United States, Rule 10.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully Submitted,

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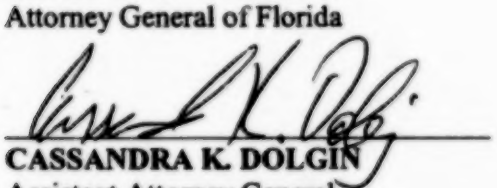
Attorney General of Florida



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